

IN THE HIGH COURT OF JUDICATURE AT PATNA
Letters Patent Appeal No.1344 of 2018

In
Civil Writ Jurisdiction Case No.4224 of 2017

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1. Ashwani Kumar, Son of Shyam Kishore Prasad, Resident of Muhalla - Padari - Ke - Haveli, Police Station - Khajekalan, District - Patna
 2. Ranjan Kumar, Son of Uma Shankar Prasad, Resident of Haveli Kharagpur, Police Station - Haveli Kharagpur, District – Munger.
 3. Randhir Roy, Son of Jagdish Roy, Resident of village - Pipara, Police Station - Nonepur, District - Begusarai

... .. Appellant/s

Versus

1. The State Of Bihar
2. The Secretary, Department of Animal Husbandry, Govt. of Bihar, New Secretariat, Patna
3. The Director, Department of Animal Husbandry, Govt. of Bihar, New Secretariat, Patna
4. The Deputy Director Head Quater , Department of Animal Husbandry, Govt. of Bihar, New Secretariat
5. The Regional Director, Animal Husbandry, Darbhanga Range, Darbhanga
6. The Special Officer, Intensive Cattle Development Block, Barauni

... .. Respondent/s

Appearance :

For the Appellant/s	:	Mr. Rajendra Narain, Sr. Advocate Mr. Makerdhvaj Upadhyay, Advocate Ms. Anju Kumari @ Anju Narain, Advocate Mr. Adesh Raj Singh, Advocate Ms. Sanjana, Advocate
For the Respondent/s	:	Mr.Md. Khurshid Alam- AAG-12

CORAM: HONOURABLE MR. JUSTICE P. B. BAJANTHRI
and
HONOURABLE MR. JUSTICE ARUN KUMAR JHA
ORAL JUDGMENT
(Per: HONOURABLE MR. JUSTICE P. B. BAJANTHRI)

Date : 28-02-2023

Heard learned counsels for respective parties.

2. The present Letters Patent Appeal is filed against



the order of the learned Single Judge dated 31.07.2018 passed in C.W.J.C. No. 4224 of 2017.

3. Brief facts of the case are that in the Animal Husbandry Department the then Regional Director of Animal Husbandry stated to have appointed appellants and others in the year 1988 to 1989. The powers of appointment to Class III post in the Animal Husbandry was vested with the then Special Officer, vide decision of the Government dated 17.02.1962 and 30th April, 1966 and it was in vogue till 20th April, 1981. On 20th April, 1981, the Bihar State Subordinate Service Selection Board (for short 'BSSSSB') was required to recruit staff of the department of the Animal Husbandry. Thereafter, State Government was competent to appoint such of those selected candidates through BSSSSB Board. On the other hand, the then Regional Director of the Animal Husbandry Department or Special Officer, proceeded to appoint directly without subjecting candidates to BSSSSB and followed by order of appointment to be issued by the State Government. This lacuna was noticed by the State Government only in the year 1997. The State Government directed the then Regional Directors, Animal Husbandry to examine all such appointments and take necessary steps for cancellation of their appointments. In this backdrop



among others, three appellants were initially appointed in the year 1988-1989. Their services were confirmed on 6.11.1991, 21.02.1992 and 21.02.1992 respectively, as is evident from the documents. Further it is noticed that they have been extended 1st A.C.P. benefit from the year 2001 and 2nd A.C.P. benefit with effect from 01.11.2009, 01.12.2009 and 01.11.2009 respectively. In this backdrop, concerned respondent proceeded to terminate the services of the appellants on 29.01.2016 on the sole ground that their initial appointment was made by a Special Officer who was not the Competent Authority to appoint them. Such action has been taken with reference to Full Bench decision of this court dated 25.11.2014 passed in C.W.J.C. No. 12904 of 1996 (Sri Sashibhushan Kumar) (For short 'Full Bench Decision'). Feeling aggrieved and dissatisfied with the order of the termination dated 29.01.2016, C.W.J.C. No. 4224 of 2017 was filed. Learned Single Judge rejected the petition while affirming the order of termination dated 29.01.2016. Hence, the present LPA.

4. Learned Counsel for the appellant vehemently contended that the appellants were appointed on *ad-hoc* basis in the year 1988-1989. Thereafter their services were confirmed in the year 1991-1992 and they have been extended the benefit of



1st and 2nd A.C.P. benefits in the year 2001 and 2009 respectively. In this backdrop, services of the appellants were abruptly terminated without resorting to departmental enquiry. Departmental inquiry was warranted in order to ascertain whether their initial appointment was ordered by incompetent authority and thereafter appellants have rendered services from 1988-1989 till 29.01.2016. At this belated stage their services could be terminated or not? It is further submitted that termination order is passed by the Director of Animal Husbandry and he is not the competent authority and in terms of Government Notification, appointing authority to Class-III is State Government. It is also submitted that the principle laid down by the Full Bench decision read with *State of Bihar Vs. Upendra Narayan Singh and Others (2009) 5 SCC 65* are not attracted to the case in hand in the light of factual aspects of the matter read with para 53 of the decision rendered in the case of *Secy., State of Karnataka V. Uma Devi* reported in *(2006)4 SCC 1*. Therefore, learned Single Judge has committed error in rejecting the writ petition.

5. *Per contra*, learned counsel for the respondents resisted the aforesaid contentions and submitted that when the appellants' appointment itself is under cloud to the extent that



Competent Authority has not passed the order of appointment in the year 1988-1989 and confirmation of their services in the year 1991-1992, therefore, there is an error committed in their initial appointment itself. The learned Single Judge has relied on Full Bench decision. Hence, no interference is called for.

6. Heard learned counsels for respective parties.

7. Undisputed facts are that appellants were appointed on daily wages basis in the year 1988-1989. Their services were regularized in the year 1989 on different dates. Thereafter, their services were confirmed on the post on 6.11.1991, 21.02.1992 and 21.02.1992 respectively, as is evident from Annexure-2 & 3 series to the writ petition. Further they have been extended the benefits of 1st and 2nd ACP with reference to length of service rendered from the date of regularization and confirmation. 1st A.C.P. benefit from the year 2001 and 2nd A.C.P. benefit with effect from 01.11.2009, 01.12.2009 and 01.11.2009 respectively have been extended to the appellants. Further it is noticed that Petitioner No. 1 is due for retirement in the year 2023 and Petitioner Nos. 2 and 3 have already attained age of superannuation and would have retired from service in the month of February, 2022 and January, 2021 respectively, in the event of their confirming in service.



8. The respondents with reference to length of service rendered by the appellants from the year 1988 till 2016, abruptly terminated their services without even holding an enquiry and providing opportunity to the respective parties and while taking note of Full bench decision viz., ***Sri Shashi Bhushan Kumar Vs. State of Bihar & Others*** and connected matters (C.W.J.C. No. 12904 of 1996) proceeded to take action. Full Bench judgment is *per incuriam* to the case in hand, for the reasons that appellants' services were regularized in the year 1989 and confirmed in the year 1991-92. Even assuming that it is disputed and confirmation was in the year 2002, however 1st and 2nd ACP benefits have been extended in the year 2001 and 2009 respectively. If the confirmation is under dispute in that event respondents had not resorted to withdraw the confirmation and the A.C.P. benefits extended to the respective appellants. In order to show that the principle of judgment is *per incuriam*, it is necessary to reproduce portion of the Full Bench Judgment:-

"In the present case, each petitioner was initially appointed as a casual worker. After serving for a year or so, each writ petitioner was regularised in Class III service on the pretext that each petitioner had rendered 'long service'. Evidently, the appointment of the petitioners was made contrary to all canons of service jurisprudence. Admittedly, the



Regional Director had not invited applications by public notice. None of the petitioners had to face competition. They were offered the employment on a platter without following due process of law. The appointment of the writ petitioners was *ex facie* bad and illegal and untenable. The judgments of the Hon'ble Supreme Court in the matter of Uma Devi (supra) or M.L. Keshri (supra) cannot be pressed into service to regularise totally illegal service of the writ petitioners. Time and again the Hon'ble Supreme Court has deprecated the illegal appointments made in the State service by adopting dubious measures and the act of regularization of such dubious appointments.

In my view, the appointment of the writ petitioners was totally illegal and arbitrary, the least that the State Government could do is to get rid of such employees appointed on extraneous consideration in utter disregard of the principle of equality enshrined in Articles 14 and 16 of the Constitution.

For the aforesaid reasons, the writ petitions and the appeal are dismissed.

Interim reliefs, if any, stand vacated."

Para 53 of *Uma Devi* decision reads as under:-

"53. One aspect needs to be clarified. There may be cases where irregular appointments (not illegal appointments) as explained in S.V. Narayanappa, R.N. Nanjundappa and B.N. Nagarajan



and referred to in para 15 above, of duly qualified persons in duly sanctioned vacant posts might have been made and the employees have continued to work for ten years or more but without the intervention of orders of the courts or of tribunals. The question of regularisation of the services of such employees may have to be considered on merits in the light of the principles settled by this Court in the cases abovereferred to and in the light of this judgment. In that context, the Union of India, the State Governments and their instrumentalities should take steps to regularise as a one-time measure, the services of such irregularly appointed, who have worked for ten years or more in duly sanctioned posts but not under cover of orders of the courts or of tribunals and should further ensure that regular recruitments are undertaken to fill those vacant sanctioned posts that require to be filled up, in cases where temporary employees or daily wagers are being now employed. The process must be set in motion within six months from this date. We also clarify that regularisation, if any already made, but not sub judice, need not be reopened based on this judgment, but there should be no further by passing of the constitutional requirement and regularising or making permanent, those not duly appointed as per the constitutional scheme." (***underline supplied***)

9. In the light of observations made in Para 53 of *Uma Devi* decision that in the event of any regularization was



already undertaken by the official respondents in that event the same cannot be reopened. This crucial issue has not been taken note of by the Full Bench and to that extent Full Bench decision is not binding and Uma Devi's case is binding. In the Full Bench decision this Court relied on *State of Bihar Vs. Upendra Narayan Singh and Others (2009) 5 SCC 65*. Upendra Narayan Singh case cited (supra) is distinguishable on factual aspects of the matter read with para 53 of Uma Devi's case. Moreover, if the initial appointment is by the Director of Animal Husbandry and it is without authority, in such an event order of termination should have been by competent authority- State Government. Therefore, termination order is without authority of law. The cited Full Bench decision has no assistance in the present case. To that extent, learned Single Judge has committed error in refusing relief(s) to the appellants.

10. Apex Court in the case of *Divisional Controller, KSRTC vs Mahadeva Shetty & Another, (2003) 7 SCC 197* in para 23 held as under:-

"23. So far as Nagesha case relied upon by the claimant is concerned, it is only to be noted that the decision does not indicate the basis for fixing of the quantum as a lump sum was fixed by the Court. The decision ordinarily is a decision on the case before the Court, while the principle underlying the decision would be binding as a



precedent in a case which comes up for decision subsequently. Therefore, while applying the decision to a later case, the Court dealing with it should carefully try to ascertain the principle laid down by the previous decision. A decision often takes its colour from the question involved in the case in which it is rendered. The scope and authority of a precedent should never be expanded unnecessarily beyond the needs of a given situation. The only thing binding as an authority upon a subsequent Judge is the principle upon which the case was decided. Statements which are not part of the ratio decidendi are distinguished as obiter dicta and are not authoritative. The task of finding the principle is fraught with difficulty as without an investigation into the facts, it cannot be assumed whether a similar direction must or ought to be made as measure of social justice. Precedents sub silentio and without argument are of no moment. Mere casual expression carry no weight at all, nor every passing expression of a Judge, however eminent, can be treated as an ex cathedra statement having the weight of authority.

36. Ingredient with the judgment *per incuriam* as quoted by Sir John Salmond in his 'Treatise on Jurisprudence' has aptly stated the circumstances under which a precedent can be treated as *per incuriam*. It is stated that a precedent is not binding for which it was rendered in ignorance of a statute or a rule having the force of statute or delegated legislation.

(Emphasis supplied)

37. Mr. Govindrajan in his book called 'Invoking the doctrine or *per incuriam*', states that the Rule applies even though the Court knew of the statutes in question but it did not refer to and had not present to its mind the precise terms of the statute. Similarly, a Court may know all the extension of a statute and yet not appreciate its relevancy to the



matter on hand, such a mistake is again *per incuriam* so as to vitiate the decision. Even the lower Court can impugn a precedent on such grounds.

38. The Apex Court in the case of **GOVERNMENT OF ANDHRA PRADESH AND ANOTHER vs B. SATYANARAYANA RAO, (2000) 4 SCC 262** observed as under:

"The Rule of *per incuriam* can be applied where Court omits to consider a binding precedent of the same Court or the superior court rendered on the same issue or where a court omits to consider any statute while deciding that issue".

39. In **THOTA SHESHARATHNAMMA AND ANOTHER vs THOTA MANIKYAMMA (DEAD) BY LEGAL REPRESENTATIVES** reported in (1991)4 SCC 312, a two Judge Bench of Apex Court held that Three Judge Bench decision in the case of **Mst. KARMI vs AMRU, (1972 (4) SCC 86)** on *per incuriam* and observed as under:

".... It is a short judgment without adverting to any provisions of Section 14(1) or 14(2) of the Act. The Judgment neither makes any mention of any argument raised in this regard nor there is any mention of the earlier decision in Seth Badri Parshad vs Srimati Kanso Devi. The decision in Mst. Karmi cannot be considered as an authority on the ambit and scope of Section 14(1) and 14(2) of the Act".

40. A decision contrary to law and Rules cannot become precedent as held in the case of **UNION OF INDIA vs S K SAIGAL, (2007) 14 SCC 556.**

In the case of **STATE OF U.P. vs SYNTHETICS AND CHEMICALS LIMITED (1991)4 SCC 139** paragraphs



40 and 41, it is held as under:

40. 'Incuria' literally means 'carelessness'. In practice *per incuriam* appears to mean *per ignoratium*. English courts have developed this principle in relaxation of the rule of stare decisis. The 'quotable in law' is avoided and ignored if it is rendered, 'in ignoratium of a statute or other binding authority', (*Young v. Bristol Aeroplane Co. Ltd.* [(1944) 1 KB 718: (1944) 2 All ER 293]) Same has been accepted, approved and adopted by this Court while interpreting Article 141 of the Constitution which embodies the doctrine of precedents as a matter of law. In *Jaisri Sahu v. Rajdewan Dubey* [(1962) 2 SCR 558: AIR 1962 SC 83] this Court while pointing out the procedure to be followed when conflicting decisions are placed before a bench extracted a passage from *Halsbury's Laws of England* incorporating one of the exceptions when the decision of an appellate court is not binding.

41. Does this principle extend and apply to a conclusion of law, which was neither raised nor proceeded by any consideration. In other words can such conclusions be considered as declaration of law? Here again the English courts and jurists have carved out an exception to the rule of precedents. It has been explained as rule of sub-silentio. "A decision passes sub-silentio, in the technical sense that has come to be attracted to that phrase, when the particular point of law involved in the decision is not perceived by the court or present to its mind." (Salmond on jurisprudence 12th Edn., p. 153). In *Lancaster Motor Company (London) Ltd. v. Bremith Ltd.* [(1941) 1 KB 675, 677: (1941) 2 All ER 11] the Court did not feel bound by earlier decision as it was rendered 'without any argument, without reference to the



crucial words of the rule and without any citation of the authority'. It was approved by this Court in *Municipal Corporation of Delhi v. Gurnam Kaur*. [(1989) 1 SCC 101] The bench held that, 'precedents sub-silentio and without argument are no moment'. The courts thus have taken recourse to this principle for relieving from injustice perpetrated by unjust precedents. A decision which is not express and is not founded on reasons nor it proceeds on consideration of issue cannot be deemed to be a law declared to have a binding effect as is contemplated by Article 141. Uniformity and consistency are core of judicial discipline. But that which escapes in the judgment without any occasion is not *ratio decidendi*. In *B. Shama Rao v. Union Territory of Pondicherry* [AIR 1967 SC 1480 : (1967) 2 SCR 650 : 20 STC 215] it was observed, 'it is trite to say that a decision is binding not because of its conclusions but in regard to its ratio and the principles, laid down therein'. Any declaration or conclusion arrived without application of mind or preceded without any reason cannot be deemed to be declaration of law or authority of a general nature binding as a precedent. Restraint in dissenting or overruling is for sake of stability and uniformity but rigidity beyond reasonable limits is inimical to the growth of law.

The decisions 'sub-silentio' and 'per incuriam' are not binding. Sub- silentio decisions flow when the particular point of law involved in the decision is not perceived by the Court of present to its mind. A point nor argued or considered by Court is said to pass sub-silentio."



11. The State Government had imposed ban of recruitment and it was relaxed qua, the Animal Husbandry Department, vide State Government's communication dated 04.07.1987, Under Secretary to the Government informed the Director, Animal Husbandry that for implementation of the schemes being operated by the department, appointments may be made on Class-IV post by committees comprising of Regional Director, Animal Husbandry as a Chairman; Regional Joint Director, Animal Husbandry/ Assistant Director, Animal Husbandry as Secretary and one officer belonging to Scheduled Caste/ Scheduled Tribe. In the guise of letter dated 04.07.1987 of the State Government one Dr. Darogi Razak, the then Regional Director, Animal Husbandry, Gaya proceeded to issue order of appointment on Class-III and Class-IV posts without resorting to advertisement and other formalities. This was noticed by the Government and proceeded to take action against him in the year 1991 and further action to such of those appointees was taken on 16.04.1996 while stalling their salary. Further noticed that other processes were stated to have been followed. On the other hand appellants were extended all service benefits including grant of ACPs. Therefore, the appellants are regular holder of the posts i.e., Government



Servants. If such Government Servants service is to be terminated, State Government should have resorted to Bihar Government Servants (Classification, Control & Appeal) Rules, 2005 read with Article 311 of Constitution. On the other hand it is a case of simple termination and to that extent there are serious lacuna in the order of termination dated 29.01.2016.

12. Upendra Narayan Singh case cited (supra) (para5) is distinguishable both on factual aspect as well as applicability of Uma Devi decision. In Upendra Narayan Singh case cited (supra) Apex Court though referred to Uma Devi (3) case, however Apex Court has taken note of only para 43, 49 and 51. Those paragraphs may suit the case of Upendra Narayan Singh, however, para 53 would spring into action in so far as appellants' case in the light of the fact that their initial appointment was in the year 1988 to 1989 followed by confirmation in the year 1989-1991 and 1992 and further 1st and 2nd ACP was extended in the year 2001 and 2009. When the State Government is of the view that competent authority to fill up the post of Class III and appointment is through BSSSS Board and State Government in such an event terminating the services of the appellants by the then Director is without authority of law. Even on this count, order of termination is



liable to be set aside.

13. Moreover, it is to be noted that having regard to the length of service rendered by each of the appellants and the fact that two appellants have already attained age of superannuation and retired from service, if they were in service and another appellant is due for retirement in the year 2023, it is not appropriate to uphold the termination order dated 29.01.2016 with reference to their initial appointment in the year 1988-1989 followed by confirmation in the year 1989, 1991 and 1992 and extended 1st and 2nd ACP benefits in the year 2001 and 2009 respectively. Respondents have opened their eyes after more than 2 decade in ascertaining whether appellants' initial appointment was by Competent Authority or not? Therefore, the appellants have made out a *prima facie* case so as to interfere with the order of termination dated 29.01.2016 and order of the learned Single Judge dated 31.07.2018 passed in C.W.J.C. No. 4224 of 2017 and they are quashed. Appellant No. 1, Ashwini Kumar, who has still service, shall be taken back to duty forthwith. The concerned respondent is hereby directed to extend all service and monetary benefits which are due to the appellants from the date of termination till retirement of Appellant Nos. 2 and 3 and Appellant No. 1 is entitled to till his



reinstatement. Monetary benefits shall be calculated in respect of each of the appellant and disburse the same along with interest @ 8% *per annum*. The above exercise shall be completed within a period of four months from the date of receipt of this order.

14. Accordingly, the present L.P.A. stands allowed.

(P. B. Bajanthri, J)

(Arun Kumar Jha, J)

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